

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARIA E. WAGNER and
KEVIN WAGNER,

vs.

**NOTICE OF MOTION
TO COMPEL DISCOVERY**

THE SHERWIN-WILLIAMS COMPANY and
SHERWIN-WILLIAMS DEVELOPMENT

Civil No.: 05-CV-0745 E/SR

Defendants.

MOTION BY: Defendants, The Sherwin-Williams
Company and Sherwin-Williams Development

RETURN DATE: To be determined by the Court.

RELIEF REQUESTED: An Order, pursuant to FRCP 37(a) compelling plaintiffs to
respond to discovery, and for a conference with the Court
to reset a scheduling order, schedule a date for trial, and/or
for settlement purposes.

SUPPORTING PAPERS: All pleadings and proceedings herein, together with the
annexed Affirmation of Christopher G. Floreale and its
exhibits.

ANSWERING PAPERS: To be served in accordance with the Court's schedule for
this motion, and at least 7 days prior to the return date.

CERTIFICATION: Moving counsel hereby certifies pursuant to FRCP
37(a)(2)(B) and local rule 37 that he has conferred in good
faith with plaintiffs' counsel in an effort to obtain the
material sought herein without Court action.

DATED: Buffalo, New York
December 8, 2008

GOLDBERG SEGALLA LLP

By: s/Christopher G. Floreale

Christopher G. Floreale
Attorneys for Defendants
665 Main Street, Suite 400
Buffalo, New York 14203
cfloreale@goldbergsegalla.com
Telephone: (716) 566-5436
Facsimile: (716) 566-5401

TO: Martin J. Zuffranieri, Esq.
Attorney for Plaintiffs
The Eberhardt Mansion
2746 Delaware Avenue
Buffalo, New York 14217
(716) 875-5000

445777.1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARIA E. WAGNER and
KEVIN WAGNER,

vs.

THE SHERWIN-WILLIAMS COMPANY and
SHERWIN-WILLIAMS DEVELOPMENT

Defendants.

ATTORNEY AFFIRMATION

Civil No.: 05-CV-0745 E/SR

Christopher G. Floreale, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am a member of the law firm of Goldberg Segalla LLP, counsel for defendants. As such, I am fully familiar with the facts, circumstances and prior pleadings of this action.

2. This affirmation is submitted in support of defendants' motion to compel certain discovery of plaintiffs.

3. This matter was commenced by the filing of a summons and complaint on or about September 15, 2005, in New York State Supreme Court for Niagara County. Defendants thereafter on October 19, 2005 filed a Notice of Removal.

4. Defendants served an answer to the complaint October 24, 2005.

5. This matter has moved very slowly. The second scheduling order entered for this matter has expired, with discovery closing in May of 2007 (Exhibit A, docket, number 7).

6. A conference was held before Hon. John T. Elfvin on June 22, 2007, to schedule a trial date. Instead, at that conference, counsel were advised that the matter was being reassigned to Judge Arcara (Exhibit A, docket number 8).

7. There has been no activity in this matter and there are no pending deadlines for this matter since the June 22, 2007 conference (Exhibit B, deadlines/hearings for 1:05-cv-00745-RJA).

8. In December of 2007, defendants, pursuant to an authorization provided by plaintiffs, received an extensive file from Social Security Disability. In connection with that file review, defendants requested a number of additional authorizations and information. To date, plaintiffs have not provided the requested authorizations and information (Exhibit C, letters dated December 5, 2007, May 1, 2008, and November 6, 2008). The foregoing constitutes defendants' good faith effort pursuant to FRCP 37(a)(2)(B) and Local Rule 37 that he has conferred in good faith with plaintiffs' counsel in an effort to obtain the material sought herein without Court action.

9. Defendants believe that the information requested is material and necessary to defending the matter, and in evaluating the value of plaintiffs' claim.

10. In an effort to move this matter forward, which as been lingering since 2005, defendants make this motion requesting an order compelling plaintiffs to provide the requested information and authorizations, as well as to schedule a conference with the Court, so that a new schedule can be put in place.

By: s/Christopher G. Floreale

Affirmed under penalty of perjury December 8, 2008
445777.1

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2008, I electronically filed the foregoing motion to compel discovery with the Clerk of the Western District Court using its CM/ECF system.

I further certify that on December 8, 2008, I mailed a copy of the foregoing motion to compel to the following, non-CM/ECF participant:

Martin J. Zuffranieri, Esq.
Attorney for Plaintiffs
The Eberhardt Mansion
2746 Delaware Avenue
Buffalo, New York 14217
(716) 875-5000

GOLDBERG SEGALLA LLP

By: s/Christopher G. Floreale

Christopher G. Floreale
Attorneys for Defendants
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Facsimile: (716) 566-5401

EXHIBIT A

SETTLE

U.S. DISTRICT COURT
U.S. District Court, Western District of New York (Buffalo)
CIVIL DOCKET FOR CASE #: 1:05-cv-00745-RJA

Wagner et al v. The Sherwin-Williams Company et al
Assigned to: Hon. Richard J. Arcara
Referred to: Hon. H. Kenneth Schroeder, Jr (Settlement)
Cause: 28:1441 Petition for Removal- Personal Injury

Date Filed: 10/19/2005
Jury Demand: Defendant
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Plaintiff

Maria E. Wagner

represented by **Martin J. Zuffranieri**
Law Office of Martin J. Zuffranieri
2746 Delaware Avenue
Kenmore , NY 14217
716-875-5000
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Kevin Wagner

represented by **Martin J. Zuffranieri**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

The Sherwin-Williams Company

represented by **Christopher G. Floreale**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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Email: rbraden@goldbergsegalla.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Sherwin-Williams Development

represented by **Christopher G. Floreale**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard A. Braden
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/19/2005	<u>1</u>	NOTICE OF REMOVAL by The Sherwin-Williams Company, Sherwin-Williams Development, from Supreme Court Niagara County, case number 123315. (Filing fee \$ 250 receipt number 18367)(DZ,) (Entered: 10/20/2005)
10/24/2005	<u>2</u>	NOTICE of Appearance by Christopher G. Floreale on behalf of all defendants (Floreale, Christopher) (Entered: 10/24/2005)
10/24/2005	<u>3</u>	ANSWER to Complaint by The Sherwin-Williams Company, Sherwin-Williams Development.(Floreale, Christopher) (Entered: 10/24/2005)
10/24/2005	<u>4</u>	DEMAND for Trial by Jury by The Sherwin-Williams Company, Sherwin-Williams Development. (Floreale, Christopher) (Entered: 10/24/2005)
11/03/2005	<u>5</u>	Corporate Disclosure Statement by The Sherwin-Williams Company, Sherwin-Williams Development. (Floreale, Christopher) (Entered: 11/03/2005)
11/03/2005		Set/Reset Hearings: Rule 16(b) Scheduling Conference set for 11/15/2005 03:15 PM before Hon. John T. Elfvin. The Court directs trial counsel to appear for rule 16 (b) conference. (It is strongly encouraged that the conference can be done by telephone (716) 551-4226; however, this must be pre-arranged by 11/9/05, in writing, with all parties agreeing as to who will initiate the conference call.) NOTICE: Failure to appear in person -- or by telephone, if pre-arranged -- may result in a dismissal of the lawsuit or an entry of default. (JBS,) (Entered: 11/03/2005)
11/15/2005		Minute Entry for proceedings held before Judge John T. Elfvin : Rule 16(b) Scheduling Conference held on 11/15/2005 via Telephone Conference. Court to issue Order. Appearances via telephone: Martin J. Zuffranieri, Paul McCormick. (JBS,) (Entered: 11/16/2005)
11/18/2005	<u>6</u>	SCHEDULING ORDER: Discovery due by 9/19/2006. Motions due by 10/20/2006. Trial Date Status Conference set for 11/17/2006 at 3:00 PM before Hon. John T. Elfvin. Jurisdiction and power to participate herein as a facilitator in settlement discussions is hereby GRANTED to Magistrate Judge H. Kenneth Schroeder, Jr. Signed by Hon. John T. Elfvin on 11/16/05. (RAZ) (Entered: 11/18/2005)

		11/18/2005)
11/18/2005		CASE REFERRED to Magistrate Judge H. Kenneth Schroeder, Jr. for settlement purposes. (RAZ) (Entered: 11/18/2005)
11/17/2006		Minute Entry for proceedings held before Judge John T. Elfvin : Scheduling Conference to Set a Date for Trial was held on 11/17/2006. Colloquy Court and Counsel. Court was advised by counsel that the case still has outstanding discovery. Court adjourned matter sine die. Counsel is to notify Court when discovery is completed and a date will be scheduled to Set a Date for Trial. Appearances: Martin J. Zuffranieri, Christopher G. Floreale. (Court Reporter HUNT.) (JBS,) (Entered: 11/24/2006)
01/22/2007	7	SECOND SCHEDULING (TEXT) ORDER: Discovery due by 5/18/2007. Motions due by 6/8/2007. Trial Date Status Conference set for 6/22/2007 at 3:00 PM before Hon. John T. Elfvin.Issued by Hon. John T. Elfvin on 1/22/07. (RAZ) (Entered: 01/22/2007)
06/22/2007		Minute Entry for proceedings held before Judge John T. Elfvin : Conference was scheduled to set a date for trial on 6/22/2007. The Court advised counsel the case would be referred to Chief Judge Richard J. Arcara. (Court Reporter HUNT-Patricia Galas.) (JBS) (Entered: 06/27/2007)
07/22/2007		Case REASSIGNED to Judge Richard J. Arcara. Judge John T. Elfvin no longer assigned to the case. (RAZ) (Entered: 07/22/2007)

PACER Service Center			
Transaction Receipt			
12/03/2008 09:42:51			
PACER Login:	gs0467	Client Code:	
Description:	Docket Report	Search Criteria:	1:05-cv-00745-RJA
Billable Pages:	2	Cost:	0.16

EXHIBIT B

1:05-cv-00745-RJA Wagner et al v. The Sherwin-Williams Company et al
 Richard J. Arcara, presiding
Date filed: 10/19/2005
Date of last filing: 07/22/2007

Deadlines/Hearings

Doc. No.	Deadline/Hearing	Event Filed	Due/Set	Satisfied	Terminated
7	🕒 Discovery Deadline	01/22/2007	05/18/2007		
7	🕒 Motions Deadline	01/22/2007	06/08/2007		
7	🕒 Trial Date Status Conference	01/22/2007	06/22/2007 at 03:00 PM		

PACER Service Center			
Transaction Receipt			
12/03/2008 09:52:36			
PACER Login:	gs0467	Client Code:	
Description:	Deadline/Hearings	Search Criteria:	1:05-cv-00745-RJA
Billable Pages:	1	Cost:	0.08

EXHIBIT C



GOLDBERG SEGALLA ^{LLP}

Attorneys at Law

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November 6, 2008

Martin J. Zuffranieri, Esq.
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2746 Delaware Avenue
Buffalo, New York 14217

THIRD REQUEST

Re: Wagner v. Sherwin Williams
Our File No. 14400.0012

Dear Mr. Zuffranieri:

This is in furtherance of my letter of May 1, 2008, a copy of which is enclosed. To date, you have not provided the requested responses.

Additionally, Mrs. Wagner signed out her films in April of 2004 from Kenmore Mercy Hospital (a CT scan of head and spine dated 2/20/04) as well as films from St. Josephs' Hospital in April of 2004. Please advise the whereabouts of those films so that we can arrange for copies.

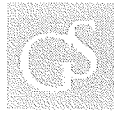
Lastly, we requested your assistance quite some time ago in securing the file from Progressive. You may recall that Progressive intend to charge us \$1.95 per page for their file, a total of \$1694.95. We have not been able to move them from this position. If the request is made by your office, the cost will be \$.75 per page.

Kindly respond in the next 30 days to avoid motion practice with regard to all of the above.

Very truly yours,

Christopher G. Floreale

CGF/ljm
Enc.



GOLDBERG SEGALLA ^{LLP}

Attorneys at Law

PENNSYLVANIA
Philadelphia

NEW YORK
Buffalo * Syracuse * Albany * Manhattan
Rochester * White Plains * Long Island

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May 1, 2008

Martin J. Zuffranieri, Esq.
The Eberhardt Mansion
2746 Delaware Avenue
Buffalo, New York 14217

SECOND REQUEST

Re: Wagner v. Sherwin Williams
Our File No. 14400.0012

Dear Mr. Zuffranieri:

On or about December 5, 2008, we forwarded you a copy of Mrs. Wagner's file that we received from Social Security Disability. At that time, we requested authorizations to obtain records as follows, based upon our review of the records contained within the Social Security file:

1. St. Josephs' Hospital, 2605 Harlem Road, Cheektowaga, 14225, back to 1998;
2. Leeland Jones MD, 1268 Orchard Park Road, West Seneca, 14224, back to 1998;
3. Beverly Stewart, P.T., 1036 Olean Road, East Aurora, 14052, back to 1998;
4. Dr. Kull, DDS, 4134 Seneca Street, West Seneca, 14224, back to 1998;
5. James Corasanti, MD, 2625 Harlem Road, West Seneca, 14224, back to 1998;
6. Dr. Sobie, 897 Delaware Avenue, Buffalo, 14203, back to 1998;
7. Physicians MRI, 2625 Harlem Road, Suite 110 Cheektowaga, 14225, for cervical spine study of March 8, 2000 and brain study of May 8, 2002;
8. Suburban Cardiology, Friedrich Albrecht, MD, 831 Maple Road, Williamsville, 14221, back to 2003;
9. Cleveland Clinic Headache Center, 9500 Euclid Avenue, Cleveland, OH, 44195, back to 1999;
10. Jeffrey Lewis MD, 550 Orchard Park Road, Suite A105, West Seneca, 14224, back to 1998.
11. Dr. Lawrence (psychiatrist), please provide address, back to 1998;
12. Patrick Hughes MD, 550 Orchard Park Road, West Seneca, 14224, back to 1993.

As of today's date, however, you have failed to provide authorizations as requested. Please provide the requested discovery within 30 days or we will have no option but to serve a motion to compel with respect to same.

Very truly yours,

Christopher G. Floreale



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December 5, 2007

Martin J. Zuffranieri, Esq.
The Eberhardt Mansion
2746 Delaware Avenue
Buffalo, New York 14217

**Re: Wagner v. Sherwin Williams
Our File No. 14400.0012**

Dear Mr. Zuffranieri:

Enclosed is a copy of Mrs. Wagner's file that we received from Social Security Disability. Please provide authorizations to obtain records as follows, based upon our review of the records contained in the Social Security file:

1. St. Josephs' Hospital, 2605 Harlem Road, Cheektowaga, 14225, back to 1998;
2. Leeland Jones MD, 1268 Orchard Park Road, West Seneca, 14224, back to 1998;
3. Beverly Stewart, P.T., 1036 Olean Road, East Aurora, 14052, back to 1998;
4. Dr. Kull, DDS, 4134 Seneca Street, West Seneca, 14224, back to 1998;
5. James Corasanti, MD, 2625 Harlem Road, West Seneca, 14224, back to 1998;
6. Dr. Sobie, 897 Delaware Avenue, Buffalo, 14203, back to 1998;
7. Physicians MRI, 2625 Harlem Road, Suite 110 Cheektowaga, 14225, for cervical spine study of March 8, 2000 and brain study of May 8, 2002;
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10. Jeffrey Lewis MD, 550 Orchard Park Road, Suite A105, West Seneca, 14224, back to 1998.
11. Dr. Lawrence (psychiatrist), please provide address, back to 1998;
12. Patrick Hughes MD, 550 Orchard Park Road, West Seneca, 14224, back to 1993.

Thank you for your courtesy.

Very truly yours,

Christopher G. Floreale

CGF/ljm
Enc.354189.1